S.B.Civil Second Appeal No.94/1989

Hiranand & Ors. vs. Attakadudin & Anr.

Date : 1.5.2006

HON'BLE MR. PRAKASH TATIA, J.

Mr. D Mulchandani, for the appellants.

Mr. SP Sharma) for the respondents.
Mr. NK Chandak)

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Heard learned counsel for the parties.

Six plaintiffs/appellants filed a suit for eviction of two defendants/respondents on the grounds that the defendants are tenants and they committed default in payment of rent and the suit property was required for personal bonafide necessity of the plaintiffs and the defendants materially altered the premises. In the suit, the defendants raised several objections and after trial, the trial court held that the plaintiffs failed to prove that the defendants are tenants in the premises in dispute. The judgment and decree of the trial court dated 17.8.1982 was challenged by the plaintiffs by preferring first appeal which too was dismissed by the first appellate court on 14.1.1988.

Against the judgments and decrees of the two courts below, this second appeal was preferred by plaintiffs/appellants and during pendency of appeal, the respondent no.2 died. No steps were taken for bringing on

record the legal representatives of deceased respondent no.2, therefore, the appeal of the appellant against the respondent no.2 was dismissed by the order dated 22.9.1996 as abated.

Thereafter, the respondent no.1 also died and notices were issued to his legal representatives. During proceedings for service of legal representatives of respondent no.1, appellant no.1 also died on 10.1.2005, therefore, an application for bringing on record the legal representatives of appellant no.1 was also submitted.

The legal representatives of respondent no.1 submitted reply to the application filed under Order 22 Rule 4 CPC and disclosed that the respondent no.1 died on 23.11.1999 whereas application has been filed on 23.1.2002, therefore, the appeal has abated. They also placed on record the death certificate of respondent no.1.

Thereupon, the appellant submitted an application under Order 22 Rule 9 CPC for setting aside of abatement after the death of respondent no.1 along with application under Section 5 of the Limitation Act supported by affidavits.

The legal representatives of respondent no.1 again contested the aforesaid applications by filing reply.

Since the appeal against the respondent no.2 has already abated and has been dismissed by the order of this Court dated 22.9.1996, therefore, the appellants were given time to show how the appeal against one of the respondent

(legal representatives of one of the respondent) can survive.

Learned counsel for the appellant could not satisfy this Court on this point.

It appears from the facts of the case that the plaintiffs pleaded that the defendants no.1 and 2 both are tenants. The finding recorded by two courts below is that the appellants failed to prove that the defendants are tenants in the house in dispute.

Looking to the nature of suit and the unity of tenancy of the respondents, the appeal cannot survive after abatement of the appeal against the respondent no.2.

In view of the above, the appeal of the appellants is dismissed as abated.

(PRAKASH TATIA), J.

S.Phophaliya